

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

SALVADOR RAMOS,

No. 2:24-CV-0946-DAD-DMC-P

Petitioner,

13 v.

## FINDINGS AND RECOMMENDATIONS

THOMAS TYLER,

### Respondent.

17 Petitioner, a prisoner proceeding pro se, brings this petition for a writ of habeas  
18 corpus pursuant to 28 U.S.C. § 2254. Pending before the Court is Petitioner's motion for an order  
19 staying the case and holding further proceedings in abeyance pending exhaustion of his claims in  
20 state court. See ECF No. 10. Respondent does not oppose a stay pursuant to Kelly v. Small, 315  
21 F.3d 1063 (9th Cir. 2002), but opposes a stay pursuant to Rhines v. Weber, 544 U.S. 269 (2005).  
22 See ECF No. 11.

1                   The district court is not required to sua sponte consider stay and abeyance in the  
2 absence of a request from the petitioner, see Robbins v. Carey, 481 F.3d 1143, 1148 (9th Cir.  
3 2007), or to inform the petitioner that stay and abeyance may be available, see Brambles v.  
4 Duncan, 412 F.3d 1066, 1070-71 (9th Cir. 2005). When a stay-and-abeyance motion is filed,  
5 there are two approaches for analyzing the motion, depending on whether the petition is mixed  
6 or fully exhausted. See Jackson v. Roe, 425 F.3d 654, 661 (9th Cir. 2005). If the petitioner  
7 seeks a stay-and-abeyance order as to a mixed petition containing both exhausted and  
8 unexhausted claims, the request is analyzed under the standard announced by the Supreme  
9 Court in Rhines v. Weber, 544 U.S. 269 (2005). See Jackson, 425 F.3d at 661. If, however, the  
10 petition currently on file is fully exhausted, and what petitioner seeks is a stay-and-abeyance  
11 order to exhaust claims not raised in the current federal petition, the approach set out in Kelly v.  
12 Small, 315 F.3d 1063 (9th Cir. 2003), overruled on other grounds by Robbins, 481 F.3d 1143,  
13 applies. See Jackson, 425 F.3d at 661; see also King v. Ryan, 564 F.3d 1133 (discussing types  
14 of stay-and-abeyance procedures).

15                   Here, the petition on file is fully exhausted and Petitioner seeks a stay-and-  
16 abeyance order to exhaust and add additional claims not currently asserted. Thus, the approach  
17 under Kelly governs. Under Kelly, the district court is required to “. . . consider the option of  
18 holding the exhausted petition in abeyance so that the petitioner would be able to exhaust his  
19 claims in state court before attempting to amend his federal petition to include the newly  
20 exhausted claims.” Jackson, 425 F.3d at 661 (citing Kelly, 315 F.3d at 1070).

21                   Respondent does not oppose a Kelly stay, which the Court finds to be  
22 appropriate in this case. The Court will recommend that Petitioner's motion be granted, that  
23 this action be stayed, and that Petitioner be required to submit regular reports on the status of  
24 state court exhaustion proceedings.

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1           Based on the foregoing, the undersigned recommends as follows:

2           1. Petitioner's unopposed motion for a stay-and-abeyance order, ECF No. 10,  
3 be GRANTED.

4           2. This action be STAYED pursuant to Kelly v. Small.

5           3. Petitioner be required to submit status reports within 60 days of the District  
6 Judge's order adopting these findings and recommendations and every 60 days thereafter until  
7 such time as state court exhaustion proceedings are concluded, following which Petitioner shall  
8 seek to amend the current petition to add the exhausted claims.

9           These findings and recommendations are submitted to the United States District  
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
11 after being served with these findings and recommendations, any party may file written objections  
12 with the Court. Responses to objections shall be filed within 14 days after service of objections.  
13 Failure to file objections within the specified time may waive the right to appeal. See Martinez v.  
14 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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16           Dated: August 7, 2024



17           DENNIS M. COTA  
18           UNITED STATES MAGISTRATE JUDGE

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